

UNITED STATES DISTRICT COURT
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

www.cand.uscourts.gov

Richard W. Wieking
Clerk

General Court Number
415.522.2000

May 28, 2008

San Mateo County Superior Court
400 County Center
Redwood City, CA 94063

RE: CV 08-0534 PJH, Osbelt v. McDonald, et al.
Your Case Number: 463528

Dear Clerk,

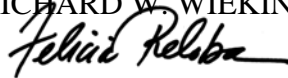
Pursuant to an order remanding the above captioned case to your court, transmitted herewith are:

- (X) Certified copies of docket entries
- (X) Certified copies of Remand Order
- () Other

Please acknowledge receipt of the above documents on the attached copy of this letter.

Sincerely,

RICHARD W. WIEKING, Clerk



by: Felicia Reloba
Case Systems Administrator

Enclosures
Copies to counsel of record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER OSBELT,

Plaintiff,

v.

DAVID D. MCDONALD, et al.,

Defendants.

No. C 08-0534 PJH

**ORDER GRANTING MOTION
TO REMAND AND DENYING
FEES AND COSTS**

Plaintiff's motion to remand the complaint came on for hearing before this court on May 21, 2008. Plaintiff, Jennifer Osbelt ("plaintiff"), appeared through her counsel, Ara R. Jabagchourian and Sean E. Ponist. Defendants David D. McDonald and Donna K. McDonald (collectively "defendants"), appeared through their counsel, William J. Goines and Cindy Hamilton. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS plaintiffs' motion to remand, and DENIES plaintiff's corresponding motion for fees and costs, for the reasons stated at the hearing, and summarized as follows.

1. Defendants have failed to establish that a valid basis for removability exists due to complete ERISA preemption. The gravamen of plaintiff's first amended complaint is a partnership dispute, and the complaint's allegations do not even mention plaintiff's 401(k) plan – the ERISA plan on which defendants base their motion. See generally Declaration of Ara Jabagchourian ISO Remand Motion ("Jabagchourian Decl."), Ex. A. Moreover, all twelve of plaintiff's claims for relief are state law claims premised on underlying allegations that generally revolve around defendants' breach of the partnership operating agreement, and subsequent actions allegedly taken to misappropriate plaintiff's and the partnership's

1 assets, among other things. See id. generally.

2 Defendants argue that, despite the presence of state law claims in her complaint,
3 plaintiff's true claim is one that alleges mismanagement of plaintiff's 401(k) plan – an
4 ERISA plan. Specifically, defendants rely on plaintiff's January 2008 deposition, at which
5 plaintiff stated that it was her belief that defendants had inappropriately and unlawfully
6 taken her money and put it in the company's 401(k) and pension profit sharing plan without
7 her permission. See Declaration of Cindy Hamilton ("Hamilton Decl."), Ex A. However,
8 while it is possible in appropriate circumstances for deposition testimony to establish
9 grounds for removability, see Karambelas v. Hughes Aircraft Co., 992 F.2d 971, 974 (9th
10 Cir. 1993), this is not the case here. For plaintiff's deposition testimony does not expressly
11 implicate an ERISA claim. Rather, plaintiff's testimony supports plaintiff's allegation of a
12 misappropriation claim based on defendants' improper taking of plaintiff's money and its
13 placement *into* a 401(k) fund. This is distinguishable from a claim based on defendants'
14 mismanagement of 401(k) funds once in the 401(k) plan – which would more likely lend
15 itself to ERISA preemption.

16 In sum, the court concludes that neither plaintiff's first amended complaint, nor
17 plaintiff's January 2008 deposition testimony, support removability based on ERISA
18 preemption.

19 2. Plaintiff's corresponding motion for fees and costs is DENIED. While the
20 court has concluded that no grounds for removability are present, the court is not
21 convinced that defendants' counsel was objectively unreasonable in seeking to remove the
22 present action.

23 **IT IS SO ORDERED.**

24 Dated: May 21, 2008



25 PHYLLIS J. HAMILTON
26 United States District Judge
27
28

ADRMOP, CLOSED, E-Filing, PRVADR

**U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:08-cv-00534-PJH
Internal Use Only**

Osbelt v. McDonald et al
Assigned to: Hon. Phyllis J. Hamilton
Case in other court: San Mateo County Superior Court, 463528
Cause: 28:1132 E.R.I.S.A.

Date Filed: 01/24/2008
Date Terminated: 05/21/2008
Jury Demand: Defendant
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Plaintiff**Jennifer Osbelt**

represented by **Ara R. Jabaghourian**
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V.

Counter-defendant

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Counter-defendant

Palo Alto Technical

represented by **Ara R. Jabaghourian**

(See above for address)

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/24/2008	<u>1</u>	NOTICE OF REMOVAL /no process from San Mateo County Superior Court. Their case number is 463528. (Filing fee \$350 receipt number 34611014933). Filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (ga, COURT STAFF) (Filed on 1/24/2008) (ga, COURT STAFF). (Additional attachment(s) added on 4/7/2008: # <u>1</u> Exh. 1, # <u>2</u> Exh. 2, # <u>3</u> Exh. 3, # <u>4</u> Exh. 4, # <u>5</u> Exh. 5, # <u>6</u> Exh. 6, # <u>7</u> Exh. 7, # <u>8</u> Exh. 8, # <u>9</u> Exh. 9, # <u>10</u> Exh. 10, # <u>11</u> Exh. 11, # <u>12</u> Exh. 12, # <u>13</u> Exh. 13, # <u>14</u> Exh. 14, # <u>15</u> Exh. 15, # <u>16</u> Exh. 16, # <u>17</u> Exh. 17, # <u>18</u> Exh. 18, # <u>19</u> Exh. 19, # <u>20</u> Exh. 20, # <u>21</u> Exh. 21, # <u>22</u> Exh. 22, # <u>23</u> Exh. 23, # <u>24</u> Exh. 24, # <u>25</u> Exh. 25, # <u>26</u> Exh. 26, # <u>27</u> Exh. 27, # <u>28</u> Exh. 28, # <u>29</u> Exh. 29) (far, COURT STAFF). (Entered: 01/28/2008)
01/24/2008	<u>2</u>	Declaration of Cindy Hamilton in Support of <u>1</u> Notice of Removal, filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (ga, COURT STAFF) (Filed on 1/24/2008) (far, COURT STAFF). (Entered: 01/28/2008)
01/24/2008	<u>3</u>	Certificate of Interested Entities by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle re <u>1</u> Notice of Removal, (ga, COURT STAFF) (Filed on 1/24/2008) (far, COURT STAFF). (Entered: 01/28/2008)
01/24/2008	<u>4</u>	DISCLOSURE STATEMENT re <u>1</u> Notice of Removal, by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (ga, COURT STAFF) (Filed on 1/24/2008) (far, COURT STAFF). (Entered: 01/28/2008)
01/24/2008	<u>5</u>	ADR SCHEDULING ORDER: Case Management Conference set for 4/30/2008 10:30 AM. Case Management Statement due by 4/23/2008.. Signed by Judge James Larson on 1/24/08. (Attachments: # <u>1</u> Judge Standing Order, # <u>2</u> Court Standing Order, # <u>3</u> Consent/Decline Form)(ga, COURT STAFF) (Filed on 1/24/2008) (Entered: 01/28/2008)

01/24/2008		CASE DESIGNATED for Electronic Filing. (ga, COURT STAFF) (Filed on 1/24/2008) (Entered: 01/28/2008)
01/28/2008	6	CERTIFICATE OF SERVICE by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle re 1 Notice of Removal, 3 Certificate of Interested Entities, 4 Affidavit, 2 Declaration in Support <i>Initial Case Management Order and ADR Deadlings and Court Handouts re Appointment of Magistrate Judge, ECF Registration and Filing Guidelines</i> (Goines, William) (Filed on 1/28/2008) (Entered: 01/28/2008)
02/22/2008	7	NOTICE OF MOTION AND MOTION for REMAND to State Court; Memorandum of Points and Authorities in Support Thereof filed by Jennifer Osbelt. Motion Hearing set for 4/9/2008 09:30 AM in Courtroom F, 15th Floor, San Francisco. (Jabagchourian, Ara) (Filed on 2/22/2008) Modified on 4/8/2008 (far, COURT STAFF). (Entered: 02/22/2008)
02/22/2008	8	Declaration in Support of 7 MOTION to Remand <i>to State Court, Memorandum of Points and Authorities in Support Thereof</i> filed by Jennifer Osbelt. (Related document(s) 7) (Jabagchourian, Ara) (Filed on 2/22/2008) (Entered: 02/22/2008)
02/22/2008	9	Proposed Order re 7 MOTION to Remand <i>to State Court, Memorandum of Points and Authorities in Support Thereof</i> by Jennifer Osbelt. (Jabagchourian, Ara) (Filed on 2/22/2008) (Entered: 02/22/2008)
02/22/2008	10	NOTICE OF MOTION AND MOTION for Costs and Expenses; Memorandum of Points and Authorities in Support Thereof filed by Jennifer Osbelt. Motion Hearing set for 4/9/2008 09:30 AM in Courtroom F, 15th Floor, San Francisco. (Jabagchourian, Ara) (Filed on 2/22/2008) Modified on 4/8/2008 (far, COURT STAFF). (Entered: 02/22/2008)
02/22/2008	11	Declaration in Support of 10 MOTION for Attorney Fees <i>Motion for Costs and Expenses; Memorandum of Points and Authorities in Support Thereof</i> filed by Jennifer Osbelt. (Related document(s) 10) (Jabagchourian, Ara) (Filed on 2/22/2008) (Entered: 02/22/2008)
02/22/2008	12	Proposed Order re 10 MOTION for Attorney Fees <i>Motion for Costs and Expenses; Memorandum of Points and Authorities in Support Thereof</i> by Jennifer Osbelt. (Jabagchourian, Ara) (Filed on 2/22/2008) (Entered: 02/22/2008)
02/22/2008		(Court only) ***Attorney Sean Eric Ponist for Jennifer Osbelt added. (far, COURT STAFF) (Filed on 2/22/2008) (Entered: 04/07/2008)
02/26/2008	13	CLERK'S NOTICE Continuing Motion Hearing Motion Hearing set for 4/30/2008 09:30 AM in Courtroom F, 15th Floor, San Francisco. (wh, COURT STAFF) (Filed on 2/26/2008) (Entered: 02/26/2008)
04/02/2008	14	Declination to Proceed Before a U.S. Magistrate Judge by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (Goines, William) (Filed on 4/2/2008) (Entered: 04/02/2008)
04/03/2008	15	CLERK'S NOTICE of Impending Reassignment to U.S. District Judge (wh, COURT STAFF) (Filed on 4/3/2008) (Entered: 04/03/2008)
04/04/2008	16	ORDER REASSIGNING CASE. Case reassigned to Judge Hon. Phyllis J. Hamilton for all further proceedings. Judge Magistrate Judge James Larson no longer assigned to the case. Signed by Executive Committee on 4/4/08. (mab, COURT STAFF) (Filed on 4/4/2008) (Entered: 04/04/2008)

04/04/2008	17	CASE MANAGEMENT SCHEDULING ORDER: Case Management Conference set for 5/1/2008 02:30 PM.. Signed by Judge Phyllis J. Hamilton on 4/4/08. (fj, COURT STAFF) (Filed on 4/4/2008) (Entered: 04/04/2008)
04/04/2008		Set/Reset Deadlines: Case Management Statement due by 4/24/2008. (fj, COURT STAFF) (Filed on 4/4/2008) (Entered: 04/04/2008)
04/07/2008	18	AMENDED NOTICE OF MOTION AND MOTION for Remand to State Court re 7 filed by Jennifer Osbelt, Palo Alto Technical. Motion Hearing set for 5/21/2008 09:00 AM in Courtroom 3, 17th Floor, San Francisco. (Jabagchourian, Ara) (Filed on 4/7/2008) Modified on 4/8/2008 (far, COURT STAFF). (Entered: 04/07/2008)
04/07/2008	19	AMENDED NOTICE OF MOTION AND MOTION for Costs and Expenses re 10 ; Memorandum of Points and Authorities in Support Thereof filed by Jennifer Osbelt, Palo Alto Technical. Motion Hearing set for 5/21/2008 09:00 AM in Courtroom 3, 17th Floor, San Francisco. (Jabagchourian, Ara) (Filed on 4/7/2008) Modified on 4/8/2008 (far, COURT STAFF). (Entered: 04/07/2008)
04/07/2008		(Court only) ***Motions terminated: 18 Amended Notice of Motion to Remand to State Court filed by Jennifer Osbelt, Palo Alto Technical, 19 Amended Notice of Motion for Attorney Fees Motion for Costs and Expenses; Memorandum of Points and Authorities in Support Thereof filed by Jennifer Osbelt, Palo Alto Technical. (far, COURT STAFF) (Filed on 4/7/2008) (Entered: 04/08/2008)
04/07/2008		Set/Reset Deadlines as to 10 MOTION for Attorney Fees Motion for Costs and Expenses; Memorandum of Points and Authorities in Support Thereof, 7 MOTION to Remand to State Court, Memorandum of Points and Authorities in Support Thereof. Motion Hearing set for 5/21/2008 09:00 AM in Courtroom 3, 17th Floor, San Francisco. (far, COURT STAFF) (Filed on 4/7/2008) (Entered: 04/08/2008)
04/10/2008	20	STIPULATION AND PROPOSED ORDER Continuing Case Management Conference re 17 Case Management Scheduling Order by Jennifer Osbelt. (Ponist, Sean) (Filed on 4/10/2008) Modified on 4/10/2008 (far, COURT STAFF). (Entered: 04/10/2008)
04/11/2008	21	STIPULATION AND ORDER CONTINUING CASE MANAGEMENT CONFERENCE re 20 Stipulation filed by Jennifer Osbelt. Signed by Judge Phyllis J. Hamilton on 4/11/08. (nah, COURT STAFF) (Filed on 4/11/2008) (Entered: 04/11/2008)
04/11/2008		Set Deadlines/Hearings: Initial Case Management Conference set for 5/22/2008 02:30 PM. Case Management Statement due by 5/15/2008. (nah, COURT STAFF) (Filed on 4/11/2008) (Entered: 04/11/2008)
04/11/2008		(Court only) ***Deadlines terminated. (far, COURT STAFF) (Filed on 4/11/2008) (Entered: 04/11/2008)
04/30/2008	22	OPPOSITION to 7 NOTICE OF MOTION AND MOTION for REMAND to State Court filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (Goines, William) (Filed on 4/30/2008) Modified on 4/30/2008 (far, COURT STAFF). (Entered: 04/30/2008)
04/30/2008	23	DECLARATION by Cindy Hamilton in Support of 22 Opposition filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (Goines, William) (Filed on 4/30/2008) Modified on 4/30/2008 (far, COURT STAFF). (Entered: 04/30/2008)

04/30/2008	24	DECLARATION of David McDonald in Support of 22 Opposition filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (Goines, William) (Filed on 4/30/2008) Modified on 4/30/2008 (far, COURT STAFF). (Entered: 04/30/2008)
04/30/2008	25	OPPOSITION to 10 NOTICE OF MOTION AND MOTION for Costs and Expenses filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (Goines, William) (Filed on 4/30/2008) Modified on 4/30/2008 (far, COURT STAFF). (Entered: 04/30/2008)
05/07/2008	26	REPLY in Support re 10 NOTICE OF MOTION AND MOTION for Costs and Expenses filed by Jennifer Osbelt. (Attachments: # 1 Declaration of Sean E. Ponist ISO Motion for Remand and Reply ISO Motion for Costs and Expenses)(Ponist, Sean) (Filed on 5/7/2008) Modified on 5/8/2008 (far, COURT STAFF). (Entered: 05/07/2008)
05/07/2008	27	ERRONEOUSLY E-FILED, DUPLICATE OF DOC 26 REPLY in Support re 10 Motion for Costs and Expenses filed by Jennifer Osbelt. (Attachments: # 1 Declaration of Sean E. Ponist ISO Plaintiffs Reply ISO Motion for Remand to State Court)(Ponist, Sean) (Filed on 5/7/2008) Modified on 5/8/2008 (far, COURT STAFF) (Entered: 05/07/2008)
05/07/2008	28	REPLY in Support re 7 NOTICE OF MOTION AND MOTION for REMAND to State Court filed by Jennifer Osbelt. (Attachments: # 1 Decl. of Sean Ponist ISO of Reply ISO Motion for Remand)(Ponist, Sean) (Filed on 5/7/2008) Modified on 5/8/2008 (far, COURT STAFF). (Entered: 05/07/2008)
05/09/2008	29	ADR Clerks Notice re: Non-Compliance with Court Order. (tjs, COURT STAFF) (Filed on 5/9/2008) (Entered: 05/09/2008)
05/12/2008	30	JOINT CASE MANAGEMENT STATEMENT filed by David D. McDonald, Donna K. McDonald, National Expert Witness Network, Technology Cle. (Goines, William) (Filed on 5/12/2008) (Entered: 05/12/2008)
05/13/2008	31	STIPULATION and Proposed Order selecting Early Neutral Evaluation by Jennifer Osbelt (Ponist, Sean) (Filed on 5/13/2008) (Entered: 05/13/2008)
05/13/2008	32	ADR Certification (ADR L.R. 3-5b) of discussion of ADR options (Ponist, Sean) (Filed on 5/13/2008) (Entered: 05/13/2008)
05/13/2008	33	Certificate of Interested Entities by Jennifer Osbelt (Ponist, Sean) (Filed on 5/13/2008) (Entered: 05/13/2008)
05/14/2008	34	ADR Certification (ADR L.R. 3-5b) of discussion of ADR options (Goines, William) (Filed on 5/14/2008) (Entered: 05/14/2008)
05/16/2008	35	STIPULATION AND ORDER SELECTING ADR PROCESS re 31 Stipulation and Proposed Order selecting Early Neutral Evaluation filed by Jennifer Osbelt. Signed by Judge Phyllis J. Hamilton on 5/16/08. (nah, COURT STAFF) (Filed on 5/16/2008) (Entered: 05/16/2008)
05/16/2008		CASE REFERRED to Private ADR. (nah, COURT STAFF) (Filed on 5/16/2008) (Entered: 05/16/2008)
05/21/2008	36	Minute Entry: Motion Hearing held on 5/21/2008 before Phyllis J. Hamilton re 10 NOTICE

		OF MOTION AND MOTION for Costs and Expenses filed by Jennifer Osbelt, 7 NOTICE OF MOTION AND MOTION for REMAND to State Court filed by Jennifer Osbelt. (Court Reporter Sahar McVickar (415) 626-6060) (nah, COURT STAFF) (Date Filed: 5/21/2008) Modified on 5/21/2008 (far, COURT STAFF). (Entered: 05/21/2008)
05/21/2008		(Court only) ***Deadlines terminated. (nah, COURT STAFF) (Filed on 5/21/2008) (Entered: 05/21/2008)
05/21/2008	37	ORDER by Judge Hamilton Granting 7 Motion to Remand and Denying 10 Fees and Costs (pjhlc2, COURT STAFF) (Filed on 5/21/2008) (Entered: 05/21/2008)
05/21/2008		(Court only) ***Civil Case Terminated. (far, COURT STAFF) (Filed on 5/21/2008) (Entered: 05/28/2008)